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| <b>55 Broadway Realty LLC v Houston Upholstery Co., Inc.</b>                                                                                                                                                                   |
| 2021 NY Slip Op 32608(U)                                                                                                                                                                                                       |
| December 8, 2021                                                                                                                                                                                                               |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 150698/2021                                                                                                                                                                                           |
| Judge: David Benjamin Cohen                                                                                                                                                                                                    |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN

PART 58

*Justice*

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INDEX NO. 150698/2021

55 BROADWAY REALTY LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

HOUSTON UPHOLSTERY CO. INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for

SUMMARY JUDGMENT.

This action by plaintiff 55 Broadway Realty LLC seeks damages based on the alleged failure by defendant Houston Upholstery Co. Inc. to perform its obligations to pay rent and additional rent pursuant to a commercial lease. Defendant's amended answer denies the allegations in the complaint and asserts fourteen (14) affirmative defenses and three (3) counterclaims. Plaintiff now moves for summary judgment seeking an award of \$49,212.98 against defendant, plus statutory interest, costs, fees, and disbursements, and setting the matter down for a hearing to determine reasonable attorneys' fees.<sup>1</sup> It also seeks the dismissal of all affirmative defenses and counterclaims. Defendant cross-moves for summary judgment on its counterclaims. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

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<sup>1</sup> In its complaint, plaintiff claims that defendant owed it \$51,244.18.

Plaintiff has met its initial burden of demonstrating its entitlement to summary judgment against defendant by submitting the deed, the lease agreement, and the affidavit of Ryan Mehra, a member of 55 Broadway Realty LLC. Plaintiff's proof demonstrates the existence of a contract, its performance under the contract, and defendant's breach of the contract. Additionally, Mehra's affidavit establishes that defendant owes plaintiff \$49,212.98 in rent and additional rent from May 2020 through February 21, 2021.

Plaintiff has also demonstrated that, pursuant to paragraph 19 of the lease, it is entitled to recover the reasonable attorneys' fees it has incurred in prosecuting this action against defendant arising from the latter's breach of the lease.

The defendant does not dispute that, while it still occupied the premises, and/or was still subject to the terms of the lease, it failed to pay rent during the period referenced above, which ended February 21, 2021, the day it vacated the premises. Nor does defendant dispute that, even after it vacated, it remained liable to plaintiff, which was entitled to seek the full amount of rent due pursuant to the agreement (*see Holy Properties v Cole Productions*, 87 NY2d 130, 133 [1995]). Instead, defendant argues that its obligation to pay rent was abated and/or terminated because of frustration of purpose and impossibility of performance under the lease because of the COVID-19 pandemic and the subsequent governmental regulations which shut down various businesses.

New York Courts have already considered and rejected arguments identical to that asserted by defendant. The doctrine of frustration of purpose "is a narrow one which does not apply unless the frustration is substantial (*see Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]; *1140 Broadway LLC v Bold Food, LLC*. 2020 NY Slip Op 34017(U), \*3 [Sup Ct, NY Cnty 2020]). To invoke the doctrine, "the frustrated purpose must be so

completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." (*Id.*) Here, the leased premises were never destroyed, and defendant does not dispute that it always had access to its warehouse. While the pandemic may have rendered defendant's business less profitable, a loss of profits, in and of itself, is insufficient to support a finding that the purpose of the lease was frustrated (*see Latipac Corp. v BMH Realty LLC*, 93 AD3d 115, 123 [1st Dept 2012]). Likewise, the doctrine of impossibility of performance is a valid excuse for failing to perform contractual obligations only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible (*see Kel Kim Corp. v Cent. Markets, Inc.*, 70 NY2d 900, 902 [1987]). A financial hardship or economic difficulty, no matter how acute, cannot, by itself, excuse performance (*see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281[1968]). This rule applies even when the financial hardship or difficulty is caused by governmental intervention (*see Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 271[1st Dept. 1993]).

Here, the leased premises, the subject matter of the agreement between the parties, remained intact. The pandemic may have made the payment of rent more difficult or burdensome but, in accordance with the vast majority of New York caselaw, that is insufficient to warrant relief based on frustration of purpose or impossibility of performance (*see Bay Plaza Community Ctr., LLC v Bronx Vistasite Eyecare, Inc.*, 2021 WL 1794562 [Sup. Ct., New York County May 5, 2021] ["Unfortunately for [tenant], the fact that its business has suffered due [to] the pandemic is not a basis to invoke either doctrine [frustration of purpose or impossibility of performance]". A temporary hardship, like the one described by [tenant], would vastly expand the reach of these doctrines if it could excuse a tenant's obligation to pay the rent."]; *1140 Broadway LLC v Bold*

*Food, LLC*, 2020 N.Y. Slip Op. 34017[U], 3, 2020 WL 7137817 [Sup. Ct., New York County 2020] [that “tenant's business was devastated by a pandemic ... does not fit into the narrow doctrine of frustration of purpose”]; *35 E. 75th St. Corp. v. Christian Louboutin L.L.C.*, 2020 N.Y. Slip Op. 34063[U], 3-4, 2020 WL 7315470 [Sup. Ct., New York County 2020] [rejecting defense even though “defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic”]; *E. 16th St. Owner LLC v Union 16 Parking LLC*, 2021 N.Y. Slip Op. 30151[U], 3-4, 2021 WL 143471 [Sup. Ct., New York County 2021] [“[t]hat their customer base was reduced because of the pandemic is not a basis to find that the frustration of purpose doctrine should apply here”]). Accordingly, these defenses are unavailing, and plaintiff is entitled to summary judgment on its claim for breach of the lease.

Finally, this Court agrees with plaintiff that defendant’s counterclaims are without merit and must be dismissed. Specifically, defendant alleges that plaintiff: (1) is harassing defendant by seeking to enforce a personal guarantee; (2) “fail[ed] to correct real estate overcharges”; and (3) failed to subtract defendant’s security deposit from the amount of its arrears.

Defendant alleges that plaintiff committed commercial harassment, as defined by New York City Administrative Code (“the Code”) § 22-902. This claim fails as a matter of law and must be dismissed. Defendant claims that plaintiff committed commercial tenant harassment by filing a complaint seeking to enforce a personal guaranty. This does not constitute harassment against the tenant, especially since plaintiff subsequently stipulated to withdraw the claim against the guarantor and proceeded only against defendant. Since defendant had already agreed to vacate the premises, the suit against the alleged guarantor cannot be deemed an attempt to

unlawfully intimidate or harass defendant into leaving the leased premises and/or abandoning any right to possession.

With respect to the security deposit, plaintiff has demonstrated that defendant breached the lease by failing to pay all rent owed and, therefore, defendant is not entitled to the return of the security deposit, which shall be credited or offset against the amount of the judgment owed for unpaid rent. Plaintiff has also demonstrated that it properly credited defendant for any overcharge regarding the escalation of real estate taxes. Accordingly, the counterclaims are dismissed.

In summary, plaintiff is entitled to summary judgment on its claims for breach of contract and unpaid rent in the amount of \$49,212.98, plus interest from May 1, 2020 and costs and disbursements as determined by the Clerk. Defendant's affirmative defenses and counterclaims are hereby dismissed. The amount of attorneys' fees owed by defendant to plaintiff shall be referred to a Special Referee for determination.

Accordingly, it is hereby:

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$ 49,212.98, together with interest at the rate of 9 % per annum from the date of May 1, 2020 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant's cross motion is denied as moot; and it is further

ORDERED that, within twenty days hereof, plaintiff shall serve a copy of this order on defendant and on the Clerk of the Trial Support Office at 60 Centre Street, Room 158 pursuant to the e-filing protocols of this Court.

## REFERENCE